No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, A CORPORATION, AND UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, A CORPORATION, PETITIONERS

v.

ANNA HALECKI, ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF WALTER JOSEPH HALECKI, DECEASED, AND ANNA HALECKI, ADMINISTRATRIX OF THE ESTATE OF WALTER JOSEPH HALECKI, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The judgment of the United States District Court for the Southern District of New York, pursuant to the verdict of a jury, was entered without an opinion (R. 65–66). The majority opinion in the United States Court of Appeals for the Second Circuit (R. 147–154) and the dissenting opinion (R. 154–160) are reported at 251 F. 2d 708.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1958 (R. 161). A timely petition for rehearing was denied on January 31, 1958 (R. 171), and a petition for rehearing en banc was denied on February 20, 1958 (R. 172). The petition for a writ of certiorari was filed on April 28, 1958, and granted on June 9, 1958 (R. 172; 357 U. S. 903). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The only question discussed in this brief is the following:[1]

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[1] While the United States takes no position, in this brief, with respect to those issues raised in the petition for certiorari concerning the applicability of the New Jersey Wrongful Death Statute and the extent to which contributory negligence may limit or bar recovery thereunder, it has been our view in prior litigation that, by virtue of 46 U. S. C. 767, the federal maritime law applies the state statute according to state law not only as to rights in rem and limitations, but also as to contributory negligence, and, therefore, that the state rule, and not the admiralty rule as to contributory negligence, should apply. See *United States* v. *Waterman Steamship Corp.*, 190 F. 2d 499, 503 (C. A. 5). Accord; *Curtis* v. *A. Garcia y Cia*, 241 F. 2d 30 (C. A. 3); *Hartford Accident & Indemnity Co.* v. *Gulf Refining Co.*, 230 F. 2d 346, 351 (C. A. 5); *Graham* v. *A. Lusi, Limited*, 206 F. 2d 223 (C. A. 5); see, also, *The Bernina (No. 2)*, 12 P. D. 58, affirmed on other grounds *sub nom. Mills* v. *Armstrong*, 13 App. Cas. 1; see also *Hill* v. *Waterman Steamship Corp.*, 251 F. 2d 655 (C. A. 3), pending on petition for a writ of certiorari, No. 147, this Term; *Union Carbide Corp.* v. *Goett*, 256 F. 2d 449, 453 (C. A. 4), pending on petition for a writ of certiorari, No. 307, this Term.

Whether a shipowner warrants the "seaworthiness" of a vessel to a shore-based worker who performs labor on a ship which is not ready for a voyage but is out of navigation and docked in a private shipyard for its annual overhaul and repair.

STATEMENT

On September 22, 1951, the pilot boat "New Jersey,"[2] owned by the petitioners, was brought into the private shipyard of Rodermond Industries, Inc. (Rodermond), located at the foot of Henderson Street, North River, Jersey City, New Jersey, for the purposes of undergoing its annual overhaul and repair (R. 3, 121–122, 124, 148). The overhaul required the vessel to be out of operation and in the repairyard for approximately three weeks (R. 133). During this period, four or five members of the deck crew, who were brought into the repairyard with the ship, painted the ship's deck, bridge, galley, mess-hall and rooms and performed certain minor repairs (R. 124).[3] The drydocking and major repairs, to be done by Rodermond, included in the "List of Repairs" drawn up by Rodermond on September 24, 1951 (R. 10, 72, 146) an item under the heading "Port & Stbd Generators," that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and that Rodermond was to "remove the eight

[2] The "New Jersey" was described as being "about 170 feet long" with a displacement of 448 gross tons (R. 132). Her primary duties were to service pilots for ships entering and leaving New York Harbor (R. 121–122).

[3] When the ship was in regular operation it ordinarily carried from seven to ten deck employees (R. 122).

(8) heads to the shop, disassemble same, grind in the valves, thoroughly clean out the heads, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes" (R. 146).

Under the same heading, the "List of Repairs," prepared by Rodermond further provided (*ibid.*):

> Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order.

Since Rodermond's shipyard was not competent to perform electrical work (R. 16), it subcontracted this part of the repair job, which included the spraying of the generators with carbon tetrachloride, to a regular electrical contractor, the K & S Electrical Company, the employer of the decedent, Walter J. Halecki (R. 16, 71).

The K & S foreman, Donald Doidge, and the decedent, Halecki, started working on the "New Jersey" on Monday, September 24, 1951. On that date, Mr. Doidge consulted with the ship's chief engineer as to when the subcontractor's men could best do the carbon tetrachloride spraying since "we know it has to be done when there is nobody else on board ship" (R. 73). Doidge had been an electrician for about twenty-five years, and Halecki had been working with him for about six years (R. 3, 71). They had used carbon tetrachloride to clean generators located in factories and buildings; their work had also included ships (R. 11–12). Doidge testified he was aware of

the difference between work in a factory and in a ship's engine room (R. 103).[4] He thought it unnecessary to discuss with the ship's chief engineer the danger or the special need of ventilation because "We knew what it was all about" (R. 3, 74).

It was decided that Saturday, when nobody would be present, would be the best time for the subcontractor to do the work (R. 73–74). Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the spraying that would be done the following day (R. 4, 75). They brought on board and into the ship's engine room two air hoses and a high compression ventilating blower, equipment which belonged to Rodermond (R. 4, 81). One air hose was to be used to spray the tetrachloride upon the generator, and the other, placed underneath the generator, was to blow the fumes away from the man who was spraying (R. 4). The blower was set so that it would exhaust foul air out through one of the two open doorways of the engine room (R. 5).[5]

[4] It was never controverted that, as petitioners' expert testified, the ship's ventilating system was entirely adequate to perform the function of ventilating the engine room with fresh air while the ship was in regular operation, but that no ship's ventilating system would be adequate to deal with the situation presented during the repairs, involving a substance which settled to the floor where the ship's ventilating system could not dislodge it (R. 40, 144):—"I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges."

[5] Carbon tetrachloride is a substance which settles to the floor from which it cannot be dislodged by ordinary ventilating equipment (R. 111, 115, 117, 121).

On Saturday morning, September 29, Doidge and Halecki boarded the "New Jersey" to undertake the spraying (R. 6, 9135). The only other person aboard the vessel was the watchman, Walter C. Thompson, who was warned to stay out of the engine room and to prevent others from going down there (R. 135). Doidge and Halecki brought with them three gas-masks and 10 gallons of carbon tetrachloride which belonged to their employer, K & S Electrical Company (R. 6, 9, 91, 99). The masks were checked but their sufficiency was not tested on this occasion (R. 99–102).

Because the ship's engines and auxiliaries were shut down or "dead" for the entire period that the ship was out of operation and undergoing repair (R. 7–8), it was necessary to bring in current from a shoreside generator* to operate not only the equipment that Doidge and Halecki had brought on board but also the ship's own ventilating system which they kept properly operating at all times, although it served only to bring in fresh air (R. 7–8, 12–13). Similarly, they kept the engine room doors and skylights wide open at all times (R. 5–6, 15, 102). Halecki wore a gas-mask and did most of the spraying. The work began at about 9:00 a. m. and concluded at about 3:30 p. m. (R. 92, 94); it was performed ten to fifteen minutes at a time with intervening rest periods of equal length (R. 10, 93, 156). Halecki became ill the following day and died two weeks thereafter from carbon tetrachloride poisoning (R. 107, 156).

*This shoreside generator, necessary to furnish power for the dead ship, belonged to Rodermond (R. 13).

Respondent, administratrix of the decedent's estate, brought suit, pursuant to the New Jersey Wrongful Death Statute, in the United States District Court for the Southern District of New York. The complaint, based upon two counts, alleged (1) negligence in providing an unfit place to work for the decedent; and (2) breach of a warranty of "seaworthiness" (R. 148, 149). The case was submitted to the jury on both counts, and the jury found in favor of the respondent in the total amount of $65,000[1] (R. 64–65). Judgment was entered accordingly (R. 65–66).

The Court of Appeals affirmed, with Circuit Judge Lumbard dissenting. The majority held, *inter alia*, that, in view of this Court's prior decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, and *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, the warranty of "seaworthiness" was properly extended to the decedent in the circumstances. The court stated (R. 150–151):

> * * * We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn, supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed

[1] Damages of $62,500 were awarded for "pecuniary loss to the widow and dependent children"; damages of $2,500 were awarded for "conscious pain and suffering to the decedent" (R. 66). Proper objections to the charge that the warranty of seaworthiness applied were taken (R. 62) and proper motions in arrest of judgment made (R. 65).

> have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra.*[*]

Judge Lumbard, in his dissenting opinion, was unable to subscribe to the principle that "a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform". He declared (R. 154):

> It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

Judge Lumbard would have reversed and remanded the case for a new trial solely on the issue of negligence (R. 160).

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[*] Judge Hand for the majority assumed that the Second Circuit's earlier decision in *Guerrini* v. *United States*, 167 F. 2d 352, certiorari denied, 335 U. S. 843, was "wrong" in view of this Court's subsequent decisions in *Pope & Talbot* and *Petterson*. Judge Hand, however, did not give weight to the fact that in *Pope & Talbot* the vessel was loading for her voyage and the work performed was directly related thereto, while in *Guerrini*, as here, the work was being performed on a vessel taken out of navigation for the specific purpose of undergoing repair.

INTEREST OF THE UNITED STATES

The United States is directly interested in the basic issue posed by this case, *viz,* whether a shipowner is to be held absolutely liable, irrespective of negligence, for damages sustained by a shore-based worker who performs labor on a vessel which is not represented to be ready and seaworthy for a voyage but, on the contrary, is out of regular operation. As the world's largest shipowner, the United States has an important financial stake in the resolution of this legal problem. There are now pending several claims involving government vessels, comparable to respondent's claim. Since the United States acts as a self-insurer with respect to many of its vessels, its special interest in this problem is far greater than that of most shipowners.

INTRODUCTION AND SUMMARY OF ARGUMENT

Upon the premise that the decedent, in cleaning the ship's generators with carbon tetrachloride spray, was performing work "of a kind that traditionally the crew has been accustomed to do" (R. 150), the court below has concluded that, in view of this Court's decisions in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, *Pope & Talbot, Inc.* v. *Hawn* 346 U. S. 406, *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396,* the shipowner warranted the "seaworthiness" of its vessel to the decedent, although concededly the vessel was not represented as ready for a voyage but on the contrary was withdrawn from regular operation. It is not our purpose in this

*Affirming, *per curiam*, *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478 (C. A. 9).

brief to dispute the premise of the court below that cleaning is seamen's work or to engage in the almost impossible task of delineating precisely what work the crew has been "traditionally" accustomed to perform. Rather, starting with full acceptance of *Sieracki* and this Court's subsequent cases, it is our aim to show that the "type of work" test is not determinative of the problem; that the shipowner's warranty of a seaworthy vessel is for a voyage, with all its incidents of loading and unloading, and does not extend to situations, as here, where the vessel is not ready to go to sea but has been taken out of operation for the specific purpose of doing work directed to ensuring its seaworthiness upon its subsequent return to operation. Thus, we show that the warranty of "seaworthiness," as established by this Court's decisions, does not and should not be extended to situations involving services performed on a vessel while it is not represented to be seaworthy for a voyage, but, on the contrary, is out of operation. We show further that neither historical, nor other considerations, would justify the extension of the ship wner's burden of absolute liability from vessels ready for sea and for loading and unloading in port to those, in the words of Judge Lumbard, "beyond the shipyard gates" (R. 157).

ARGUMENT

THE SEAWORTHINESS DOCTRINE DOES NOT, AND SHOULD NOT, APPLY TO A VESSEL WHICH IS NOT WARRANTED READY FOR NAVIGATION

A. THIS COURT'S DECISIONS IN *SIERACKI, POPE & TALBOT, PETTERSON,* AND *ROGERS* COVER ONLY WORK PERFORMED ON A VESSEL REPRESENTED AS SEAWORTHY FOR A VOYAGE

In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, the Court extended the shipowner's absolute warranty of a seaworthy ship from those, such as shippers, passengers and seamen, who are in privity of contract with the shipowner, so as to bring within its protection longshoremen, and other shore-based workmen employed by independent special contractors who are engaged nonetheless in work incident to the loading or unloading of the vessel in the course of its voyage.[10] The rationale of this extension, foreshadowed by Judge Benedict's opinion in *Gerrity* v. *Bark Kate Cann,* 2 Fed. 241, 246 (E. D. N. Y.), and similar to that of *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382, is that the shoreworkers, although not

[10] That seamen were entitled to the same warranty of the vessel's seaworthiness for the voyage as were shippers and passengers was recognized by Judge Peters in *Dixon* v. *The Cyrus,* 2 Peters Adm. 407, 7 Fed. Cas. No. 3,930 (D. Pa.), and was early affirmed by the textwriters. Curtis, *Rights and Duties of Merchant Seamen* (Boston, 1841), p. 20; 2 Parsons, *Shipping and Admiralty* (Boston, 1869), p. 78. The classical formulation is found in *Rainey* v. *New York & P. S. S. Co.,* 216 Fed. 449, 453 (C. A. 9), where, after discussing the warranty of seaworthiness for the voyage as applied by this Court in the case of shippers, the court declared: "A fortiori does the same rule apply to cases where the lives of passengers or crew are involved." For the history of the doctrine in seamen's cases see *Adams* v. *Bortz,* 279 Fed. 521 (C. A. 2).

in privity of contract, are equally within the representation of the vessel as seaworthy for the voyage.

The *Sieracki* decision was further based on the premise that loading and unloading were part of the voyage and that, "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew" (328 U. S. at 96).[11] The Court held, therefore, that the shipowner could not escape the consequences of his traditional representation of the vessel as seaworthy for the voyage by parcelling out to intermediary employers services incident to navigation which were traditionally performed by seamen. "For these purposes he [the longshoreman] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards" (328 U. S. at 99).

The Court found further support for its result in "the trend and policy" (328 U. S. at 97) of its prior decisions in which longshoremen loading and unloading vessels were treated as "seamen" and thus conferred rights of recovery under the Jones Act[12] (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50); and in which an injury to a longshoreman was classi-

[11] This factual premise is sharply disputed in Tetreault, *Seaman, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 413–414 (1954). A scholarly account of the seaworthiness doctrine is found in Benbow, *Seaworthiness and Seamen*, 9 Miami L. Q. 418 (1955).

[12] The Merchant Marine Act of 1920, 41 Stat. 988, 1007, 46 U. S. C. 688, extended to "seamen" the benefits of the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C. 51. By statute (46 U. S. C. 713), "seaman" includes "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board."

fied as a marine tort and thus considered within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

In three subsequent decisions, involving loading or unloading for the course of a voyage, this Court has reaffirmed its *Sieracki* conclusion. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, a carpenter whose work involved the repair of a "slight defect" in the vessel's loading equipment, and who "was put to work on it so that the loading could go on at once" (*id.* at 413), was held to be entitled to recover on the ground of unseaworthiness. Again, in *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit[13] granting the protection of the warranty of seaworthiness to a longshoreman injured by a breaking block while engaged in loading the vessel for a voyage. And, finally, in *Rogers* v. *United States Lines*, 347 U. S. 984, the Court held, again *per curiam* and without opinion, that a longshoreman unloading at the voyage end was equally within the warranty.[14]

Thus, in each of the cases in which this Court has applied the warranty of seaworthiness to non-members of the ship's company, it is plain that the vessel was in navigation on a voyage and represented by her owner as being seaworthy for that purpose, with the work performed by the particular employee being directed to the immediate carrying out of the ship's voyage; in *Sieracki*, *Petterson* and *Rogers*, there was loading or unloading of the vessel in the execution of

[13] *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478.

[14] Reversing 205 F. 2d 57 (C. A. 3).

her voyage, and in *Pope & Talbot* the performance of work related inextricably to the loading for the voyage itself. In none of these cases had the vessel completed her unloading and been withdrawn from navigation, as here, for the specific purpose of making it seaworthy for future voyages.[15] On the contrary, the vessels *were* in active navigation on their voyages; they were held out by their owners as being in all respects in a seaworthy condition for their voyages; and this Court recognized that those who were doing the work of seamen were entitled, even in the absence of privity of contract, to rely, like crew members, upon the owners' implied representation of the vessels' seaworthiness for their respective voyages.

B. THERE IS NO JUSTIFICATION FOR EXTENDING THE *SIERACKI* DOCTRINE TO COVER WORK PERFORMED ON A VESSEL WHILE IT IS NOT REPRESENTED AS SEAWORTHY FOR A VOYAGE BUT IS OUT OF NAVIGATION

This Court and other federal courts have consistently recognized the distinction between the legal situation of a seaman working on a vessel in navigation on a voyage and one who works on a vessel which has been removed from navigation.[16] For example, in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, the

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[15] The crew member cases similarly involved only the warranty of the vessel's seaworthiness for a voyage. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255. Cf. *The Osceola*, 189 U. S. 158, 175, and see Smith, *Liability for Injuries to Seamen*, 19 Harvard L. R. 418, 422–424 (1906).

[16] The fact that the "New Jersey" was in navigable waters while it was withdrawn from regular operation for its overhaul (R. 80–81) does not, of course, make it a ship in navigation. See *Butler* v. *Whiteman*, 356 U. S. 271. Although the issue of whether a ship is in navigation is ordinarily one for the trier of fact, *ibid.*,

Court passed upon the question of whether one doing seasonal repair work on a boat after the end of its navigation continued to be a "seaman" within the meaning of the Jones Act.[17] The decedent, Desper, had been employed during the summer months as an operator of one of a fleet of motorboats carrying sightseers. His employment had been terminated and thereafter he had helped to lay up the boats for the winter. He was then reemployed in the spring and was injured while helping to paint, clean and waterproof the boats in preparing them for navigation. At the time of the injury, none of the boats was afloat, nor did they have a captain or crew. The Court concluded that, "while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter'." *Id.* at 191. See, also, *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185 (C. A. 6); *Hawn* v. *American S. S. Co.*, 107 F. 2d 999 (C. A. 2); *Seneca Washed Gravel Corporation* v. *McManigal*, 65 F. 2d 779 (C. A. 2); *Gonzales* v. *U. S. Shipping Board, E. F. Corp.*, 3 F. 2d 168 (E. D. N. Y.).

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it was neither put to the jury in this case nor was it ever raised by either of the parties in the courts below. In any event, we do not think that reasonable men could conclude other than that the "New Jersey," with its engines and generators dead and its power being supplied by a shoreside generator while undergoing repair, was a ship out of navigation.

[17] It will be remembered, *supra*, p. 12, that the Court, in *Sieracki*, found support for its conclusion that the longshoreman was to be regarded as a "seaman" in another Jones Act case, *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50.

We can perceive no sound distinction between the status of the vessels and the type of work being performed in the *Starved Rock Ferry Co.* case and the status of the "New Jersey" and the type of work being performed in the instant case. While the vessel here had not been "laid up for the winter," it had nevertheless completed its voyage and been withdrawn from service for the purpose of undergoing its annual overhaul and repair. The repair work being performed was not an incident of the current voyage nor of a hurried nature as in *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U. S. at 413. The overhauling of the "New Jersey" required its presence in the contractor's shipyard for some three weeks, and the specialized work subcontracted out by the shipyard to the employer of Halecki and Doidge, which took almost an entire working day, was expressly undertaken at a time when no crew but only a watchman would be aboard. In these circumstances, we submit, Halecki was no more properly a "seaman" for purposes of a warranty of "seaworthiness" than was the worker, Desper, in the *Starved Rock Ferry* case for the purposes of Jones Act recovery.

Although, in many decisions, the results have been referred to the particular type of work the particular employee was performing, the lower courts have recognized implicitly that the status of the vessel at the time of the injury is a crucial factor in determining the nature of the work and the existence of a warranty of the vessel's seaworthiness. In *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385 (C. A. 9), certiorari denied, 354 U. S. 938, the claimant was a

workman of a shipyard corporation engaged in repair of the shipowner's vessel which was in drydock with only a skeleton crew aboard. While repairing the propulsion machinery of the vessel, a grinding wheel furnished claimant by the shipyard corporation disintegrated causing his injury. In rejecting the argument that the *Sieracki* rule was applicable, although the vessel was not engaged on a voyage, the Court of Appeals stressed that "the repairs had nothing to do with loading or unloading the ship" and were "nothing of an improvised, hurried nature, done to save the 'ship work' time, but were of sufficient importance to cause the ship to be drydocked" (238 F. 2d at 387).

In *Union Carbide Corp.* v. *Goett*, 256 F. 2d 449 (C. A. 4), pending on petition for a writ of certiorari, No. 307, this Term, a repairman was drowned when he fell into the water from a barge which was not in its ordinary operation but was moored at his employer's repairyard, and the vessel was claimed to be "unseaworthy" because not equipped with life rings to throw to him. The court held that the vessel had been "withdrawn from navigation" and "The warranty of seaworthiness does not apply in that situation" (*id.* at 455). See, also, *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md.), affirmed, *per curiam*, 252 F. 2d 117 (C. A. 4), certiorari denied, 356 U. S. 973.

So, in *West* v. *United States*, 143 F. Supp. 473 (E. D. Pa.), affirmed by the Court of Appeals for the Third Circuit on July 2, 1958,[18] the Court of Appeals declined to find that a warranty of seaworthiness was

[18] A copy of this opinion is set forth in the Appendix, *infra*, pp. 22–26.

available to a claimant who was working on board a vessel which had been deactivated during the Korean hostilities, and, while alongside a pier in Philadelphia with a skeleton crew on board, was being prepared for service by a contractor. The court observed (Appendix, *infra*, p. 25): "We do not think that the [ship] at the time of this accident was a ship in navigation nor do we think that the work which [claimant] was doing was seamen's work so that the warranty of seaworthiness ran to him."

The error of the Second Circuit in this case in failing to consider the status of the "New Jersey" as not represented by her owners as seaworthy for a voyage but, on the contrary, as a ship withdrawn from navigation at the time of the injury [19] is emphasized by another decision of that court, entered the same day, in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717, certiorari denied, 356 U. S. 958. In that case, the court held there was no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when a defective shackle pin caused a chain tackle to fall and dislodge him from a scaffold. The court, recognizing that the shackle pin was obviously, in the language of the

[19] Judge Hand assumed in this case (R. 150) that the Second Circuit's earlier decision in *Guerrini* v. *United States*, 167 F. 2d 352, certiorari denied, 335 U. S. 843, refusing to extend the warranty of seaworthiness to an employee cleaning the ship's tanks while the ship was out of navigation and in a shipyard, was "wrong" in view of this Court's subsequent decisions in *Pope & Talbot* and *Petterson*. See fn. 8, *supra*, p. 8.

trial judge, "unseaworthy" (251 F. 2d at 718), nevertheless held that there was no warranty of seaworthiness to the claimant because "the reconstruction of a ship was not traditionally the task of the crew" (*ibid.*).

If the warranty of seaworthiness is not viewed as of the vessel's seaworthiness *for the voyage,* the rigger's work in *Berge,* as Judge Lumbard noted in the instant case (R. 159), could easily have been characterized "as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm." This would have been consistent with the characterization of Halecki's work in the instant case as "cleaning." However, since the ship in *Berge* was equally clearly not a vessel in navigation, it becomes plain, in our view, that the claimant could not be considered a "seaman" entitled to a warranty of seaworthiness for the voyage within the *Sieracki* rule. Similarly, the fact that the vessel here was withdrawn from navigation at the time of respondent's injury should prevent the finding of any warranty of seaworthiness because there was no representation of fitness for a voyage.

In all events there is no question but that in the present case the ship's own ventilating equipment was "seaworthy" for the purposes of ventilating the engine room—the only purpose for which it was designed to be used while the ship was in navigation (R. 40).[20] At a

[20] Cf. *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397, 400 (C. A. 2): "[The warranty of seaworthiness] requires only that equipment be reasonably fit for the use for which it was intended * * *" See also *Boudin* v. *Lykes Bros.*

time when the ship was not in the execution of a voyage, but out of navigation and undergoing repair, it was the use of the subcontractor's equipment—foreign to the ship, and, as the record discloses, foreign to any ship—that brought about decedent's injury. In these circumstances, we submit, there is no justification for the extension of the warranty of seaworthiness traditionaliy made in respect of a ship in navigation on a voyage.[21]

It should be noted that, even in the absence of a warranty of seaworthiness, those in the position of respondent's decedent—working on a vessel that is not in readiness for a voyage—are not without remedy against the shipowner, the shipyard, or their employer. See especially *Berryhill* v. *Pacific Far East Line, supra,* 238 F. 2d at 387–388. Actions based upon negligence, particularly in failing to furnish a safe work place, may still be brought against the ship-

S. S. Co., 348 U. S. 336, 339; *Doucette* v. *Vincent*, 194 F. 2d 834, 837–838 (C. A. 1); *Manhat* v. *United States*, 220 F. 2d 143, 148 (C. A. 2), certiorari denied, 349 U. S. 966; *Hanrahan* v. *Pacific Transport Co.*, 262 Fed. 951, 952 (C. A. 2).

[21] It should be noted that the warranty of seaworthiness to seamen is correlated to that to shippers and passengers and made its first appearance in American jurisprudence in cases where mariners were suing for their wages and where the unseaworthiness of the vessel "at the commencement of the voyage" would excuse non-performance by the mariners. *E. g. Dixon* v. *The Cyrus*, 2 Peters Adm. 407, 7 Fed. Cas. No. 3,930 at p. 757 (D. Pa.); see Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 389–390; Benbow, *Seaworthiness and Seamen*, 9 Miami L. Q. 418; Smith, *Liability for Injuries to Seamen*, 19 Harvard L. R. 418, 423–424.

owner or shipyard.[22] And the employer may be proceeded against under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, or, alternatively, under applicable state remedies.

CONCLUSION

The District Court erred in instructing the jury that in the circumstances of this case the defendant had warranted to the plaintiff's decedent that the vessel was seaworthy in respect of the sufficiency of the ventilating equipment brought aboard by Halecki's employer to supplement the ship's normal ventilating equipment. It is therefore respectfully submitted that the judgments of both courts below should be reversed.

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SEPTEMBER 1958.

[22] In this case, it is impossible to tell whether the jury's verdict was based on the unseaworthiness count or on the count charging failure to furnish a safe work place. See the Statement, *supra*, pp. 7–8.

APPENDIX

United States Court of Appeals for the Third Circuit

No. 12,507

EDGAR ALLEN WEST, APPELLANT

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, RESPONDENTS

v.

ATLANTIC PORT CONTRACTORS, INC., IMPLEADED RESPONDENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 2, 1958

Before MARIS, GOODRICH and MCLAUGHLIN, *Circuit Judges*

Opinion of the Court

(Filed July 2, 1958)

By GOODRICH, *Circuit Judge.*

This is an appeal from a judgment for the respondent in a personal injury case brought by the libelant against the United States as owner of a ship called "S. S. Mary Austin." The case is here for the second time. Following the first hearing, we sent it back to the district court for a further finding which has been made, 246 F. 2d 443 (3d Cir. 1957). The

case comes to us after a very competent discussion of its problems by the trial judge, 143 F. Supp. 473 (E. D. Pa. 1956), which has already been cited with approval by other courts.[1] We do not need to state more than a brief summary of the facts for the purpose of our discussion here.

The "Mary Austin," owned by the United States, was one of the ships put in "moth balls" at Norfolk, Virginia, after World War II. During the Korean conflict the decision was made to reactivate her and she was towed from Norfolk to Chester, Pennsylvania, and from Chester brought up and tied alongside a pier in Philadelphia. The contract for the work to put the ship back in service was let to a concern called Atlantic Port Contractors, Inc. This company had full charge of the work. On the day of the accident which is the source of this litigation, West, an engineer, was working in the low-pressure cylinder of the ship's main engine. He was hit on the knee by a metal plug which came out of an overhead water pipe when some other employee of the contractor turned on the water without warning. The plug was evidently loose enough so that the pressure of the water forced it from the pipe. West sues for the injuries thus received.

The libelant's case is in the usual form for this type of litigation. Unseaworthiness is charged; likewise, negligence in failing to provide plaintiff with a "safe place to work." The latter can be treated first because its discussion will take a very short time. On West's behalf it is urged that the duty to provide a safe place to work is absolute and nondelegable and

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[1] *Berge* v. *National Bulk Carriers, Inc.*, 148 F. Supp. 608 (S. D. N. Y. 1957), aff'd., 251 F. 2d 717 (2d Cir. 1958); *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md. 1957), aff'd., 252 F. 2d 117 (4th Cir.), cert. denied, 356 U. S. 973 (1958).

hence the United States, as owner of the ship, cannot escape responsibility by placing a contractor in charge of the ship. In other words, we would have, if libelant's theory were followed, something like, and even greater than, the insurer's liability for seaworthiness which an owner fails to fulfill at his peril.

But the legal responsibility for the place in which a workman carries on activities is not an insurer's liability for safety but responsibility only for the exercise of reasonable care with regard to the premises at which work is done. It is a nondelegable duty but not an absolute one. It is rather a nondelegable obligation that reasonable care shall be used. This was pointed out with clarity by this Court in *Barbazon* v. *Belships Co.*, 202 F. 2d 904 (3d Cir. 1953), and reiterated by us in *Osnovitz* v. *United States*, 204 F. 2d 654 (3d Cir. 1953).

So far as these premises were concerned there was no lack of safety. Even if the plug was loose that did no harm to West or anyone else. The accident to West came because a fellow employee of the contractor did a positive and negligent act. For such superadded, affirmative conduct, the owner of the premises is not responsible. See 2 Restatement, Torts § 426 (1934).

We come then to the problem of seaworthiness. Here is a responsibility not discharged by the exercise of reasonable care. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96 (1944). In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), this protection was extended to a stevedore who was doing seamen's work.[2]

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[2] At least the theory was that he was doing seamen's work although it is now asserted that the premise is incorrect. See Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 413–14 (1954).

We do not think that the "Mary Austin" at the time of this accident was a ship in navigation nor do we think that the work which West was doing was seamen's work so that the warranty of seaworthiness ran to him.

Counsel for the libelant insists that anything floating on the water is in navigation although he concedes that an uncompleted vessel just launched is not in navigation. See *Franke* v. *Bethlehem-Fairfield Shipyard, Inc.*, 132 F. 2d 634 (4th Cir. 1942). But *cf. United States* v. *Lindgren*, 28 F. 2d 725 (4th Cir. 1928).

The closest ruling authority is *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187 (1952). There sightseeing boats had been hauled up on the shore for the winter layoff. The Court held that the warranty of seaworthiness did not extend to the libelant's decedent who was fatally injured while engaged in painting and repairing these vessels in preparation for their seasonal launching. We do not find in the Court's discussion in that case any such rule of thumb test as contended for by the appellant. We think the reason which controls here is that the vessel was out of service as a ship fully and as completely as a vessel which has just been launched but which is not yet ready for service as a ship. See *Harris* v. *Whiteman*, 243 F. 2d 563 (5th Cir. 1957); *cf. Gonzales* v. *United States Shipping Bd.*, 3 F. 2d 168 (E. D. N. Y. 1924). See also *Owens* v. *United States*, 1958 Am. Mar. Cas. 216 (S. D. Fla. 1957) (a case similar to ours). It is not as though the "Mary Austin" had finished a voyage and was having repair work done before resuming business again. This ship had been laid up for some time and had to be thoroughly rehabilitated before getting back to service. She had no crew, contrary to argument made by libelant. There were employees

of the United States on the ship. They had signed no articles and they were there not as a ship's crew but as inspectors on behalf of the United States to see that the work was done in accordance with the contract.

The same sort of argument applies to the work which West was doing. It may be possible to say, as the Supreme Court has, that a stevedore loading or unloading a ship (*Sieracki, supra*), or a carpenter repairing grain-loading equipment on a ship in active navigation (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953)), are performing work of a maritime nature. But this libelant was a shoreside engineer who came on board to work on the rehabilitation job preparatory to getting the ship back into service. That is not something which bears any resemblance to marine navigation.

Each of these cases differs from the next in some respects of course. We find *Berryhill* v. *Pacific Far East Line, Inc.*, 238 F. 2d 385 (9th Cir.), *cert. denied*, 354 U. S. 938 (1957), and *Raidy* v. *United States*, 252 F. 2d 117 (1958), assuming and adopting the trial court's opinion reported in 153 F. Supp. 777 (D. Md. 1957), cert. denied, 356 U. S. 973 (1958), helpful and very close to ours. Judge Hand puts it well in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (2d Cir. 1958), "Obviously there must be some limit, else the whole fabrication of a new ship would be included [within the *Sieracki* rule]. We can only say that the reconstruction of a ship was not traditionally the task of the crew." *Read* v. *United States*, 201 F. 2d 758 (3d Cir. 1953), is distinguishable, from the instant case at least, on the amount of work involved.

The judgment of the district court will be affirmed.

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